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No. 96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CLARENCE MOORE and
PENNLYCO, LTD.,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

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PETITION FOR A WRIT OF CERTIORARI

Cheryl Flax-Davidson
(Counsel of Record)
5441 Chevy Chase Parkway
Washington, D.C. 20015
(202) 363-9723
Attorney for Petitioners

4400

QUESTION PRESENTED

Whether the Commonwealth of Pennsylvania, through its Department of Environmental Resources, took Petitioners' oil and gas property without compensation in violation of Petitioners' Fifth and Fourteenth Amendment rights where:

The Commonwealth's mistaken claim of title and its exercise of dominion and control over Petitioners' oil and gas property substantially deprived Petitioners' of their ability to lease, develop, or derive any income from the property for a period of years.

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v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioners Clarence Moore and Pennlyco, Ltd. respectfully pray that a writ of certiorari issue to review the Order of the Supreme Court of Pennsylvania entered on February 26, 1996.

OPINIONS BELOW

The Order of the Supreme Court of Pennsylvania dated February 26, 1996, denying Petitioners' Petition for Allowance of Appeal is reported at 673 A.2d 338 (Pa. 1996) and is reprinted in the Appendix to this petition at 1a. The Order and Opinion of the Commonwealth Court of Pennsylvania, dated June 6, 1995, is reported at 660 A.2d 677 (Pa. Commw. Ct. 1995) and is reprinted in the Appendix to this petition at 2a-13a. The Order denying Appellees' application for rehearing is reprinted in the Appendix to this petition at 14a. The Opinion and Order of the Court of Common Pleas of Lycoming County, dated January 11, 1994, is unreported and is reprinted in the Appendix to this petition at 15a-27a.

JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on February 26, 1996. Jurisdiction is conferred on this Court by 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Just Compensation Clause of the Fifth Amendment to the United States Constitution provides:

> ...[N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 10 of the Constitution of Pennsylvania provides in pertinent part:

> ...[N]or shall private property be taken or applied to public use, without authority of

law and without just compensation being first made or secured.

Section 502(e) of the Eminent Domain Code, 26 Pa. C.S. §1-502(e), provides:

> If there has been a compensable injury suffered and no declaration of taking therefore has been filed, a condemnee may file a petition for appointment of viewers substantially in the form provided for in subsection (a) of this section, setting forth such injury.

STATEMENT OF THE CASE

Petitioners present a simple, straight-forward case of a "taking" by a governmental entity. The Department of Environmental Resources (hereinafter "DER") is an agency of the Commonwealth of Pennsylvania and the owner of the surface estate of 25,621 acres of land situated in Pennsylvania's Tiadaghton State Forest. Petitioners are the owners of the subsurface oil and gas estate of this property.

In 1979, DER asserted to Petitioners that it owned a reversionary interest in Petitioners' oil and gas estate and that, pursuant to this ownership interest, in March 1983, it would take control of that oil and gas estate. Beginning in 1979, DER made public this declaration of future ownership in the form of maps, which designated and plotted Petitioners' property as being reserved to the Commonwealth as part of the state park system after March, 1983. Petitioners denied that DER held a reversionary interest in this property.

In March, 1983, DER took physical control of Petitioners' oil and gas estate. Exercising its governmental authority, DER caused Petitioners' names to be removed from the county tax rolls as the owners of the property and Petitioners lost their right to sell, lease, or otherwise develop these oil and gas rights. DER, holding

itself out as the owner of the property, advertised a lease/auction of the oil and gas estate and then entered into a five-year lease with Pennzoil Company, in which Pennzoil agreed to develop the oil and gas. During that five-year period, the Commonwealth of Pennsylvania received $297,000 from the Pennzoil lease.

On October 30, 1984, DER conceded that Petitioners owned a portion of the subject oil and gas estate totaling 6,841 acres. On November 17, 1989, pursuant to a Quiet Title action initiated by Petitioners, the Commonwealth Court of Pennsylvania held that Petitioners were the owners of the remaining parcel of 18,780 acres of the oil and gas estate. *See Moore v. Department of Environmental Resources*, 129 Pa. Commw. 628, 566 A.2d 905 (Pa. Commw. Ct. 1989).

Petitioners filed a Petition for Appointment of Viewers on October 27, 1992 pursuant to Pennsylvania law, alleging a compensable taking of Petitioners' oil and gas estate under both Pennsylvania and federal law for the years in which DER had deprived Petitioners of the use and enjoyment of their property.

The Court of Common Pleas issued an Opinion and Order on January 11, 1994, in which it concluded that:

> Based on these facts, the court finds that Petitioners suffered damages as a direct consequence of DER's actions. Petitioners were unable to realize any income from their property interest during this time DER claimed ownership, and during the time DER took control of the property, Petitioners were unable to use or enjoy their property in any manner.

DER appealed, and the Commonwealth Court of Pennsylvania reversed, finding that there was no taking because "Simply put, DER was not acting as a condemnor; it was acting as an owner." Opin. at 13a. Petitioners' Application for Reargument was denied on July 19, 1995. The Supreme Court of Pennsylvania

denied Petitioners' Petition for Allowance of Appeal on February 26, 1996.

The federal constitutional question sought to be reviewed by this Court was raised at every stage of the proceedings below, both in the court of first instance (by Petition for Appointment of Viewers on October 27, 1992) and in the appellate courts. Petitioners specifically contended in their brief to the Supreme Court of Pennsylvania on Petition for Allowance of Appeal that "DER's exercise of dominion and control over Petitioners' property as part of the state forest, advertising of Petitioners' property to third persons, the actual leasing of Petitioners' mineral estate to third persons, and the collection of almost $300,000 in rental without compensation to Petitioners' violated the Fifth and Fourteenth Amendments to the U.S. Constitution."

The federal constitutional question sought to be reviewed by this Court was timely and properly raised at every stage of the proceeding so as to accord this Court jurisdiction to review the judgment on Petitioners' Writ of Certiorari. The trial court did not specifically address this federal constitutional issue but the Commonwealth Court of Pennsylvania made reference to this Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) in support of a "case by case approach to the quesion of what constitutes a taking within the meaning of the Fifth amendment to the United States Constitution. Opin. at 5a.

REASON FOR GRANTING THE WRIT

I. THE COURT BELOW DECIDED AN IMPORTANT AND SUBSTANTIAL QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE GOVERNING PRINCIPLES OF PRIOR DECISIONS BY THIS COURT

A. The Commonwealth of Pennsylvania Unconstitutionally Permits the Subjective Intent of the Government to Determine Whether There Has Been a "Compensable Taking" of Private Property.

In the case before this Court, the Department of Environmental Resources, an agency of the Commonwealth of Pennsylvania, took physical possession and title to Petitioners' oil and gas estate without compensation or consent and, as owner of this estate, leased development rights to a third party, Pennzoil. The income derived from this taking, in the amount of nearly $300,000, enured to the public's benefit. Thus acting pursuant to its authority as an agency of the Commonwealth of Pennsylvania, DER took Petitioners' property for public use. Under principles previously enunciated by this Court, the Commonwealth of Pennsylvania may not constitutionally refuse to compensate Petitioners where the government took title, dominion, and control over Petitioners' property, thereby depriving them of all ownership rights for a period of years.

The Just Compensation Clause of the Fifth Amendment made applicable to the States through the Fourteenth Amendment, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *see Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897), states in clear and unequivocal terms: "[N]or shall private property be taken for public use, without just compensation." The question presented in this case is whether a government entity must pay just compensation when it *mistakenly* takes private property for public use. Neither the language of the Just Compensation Clause nor Supreme Court cases interpreting this constitutional amendment make reference to a government's subjective intent at the time it takes private property. In fact, the Just Compensation Clause makes no reference whatsoever to the "taker" of property but is concerned only with compensating the victim of a governmental taking. Despite this unambiguous directive, the Commonwealth Court of Pennsylvania held that DER was not a "condemnor" of Petitioners' property because Petitioners had failed to show that DER exercised its power of eminent domain over the property. According to the Commonwealth Court, "To proceed under §502(e) of the Code, a *de facto* taking must result from a governmental body's actual exercise of eminent domain." Opin.

at 7a. Pursuant to this reasoning, the Commonwealth Court maintained that DER could not be considered a condemnor because "DER claimed, albeit mistakenly, an ownership interest in those rights which it believed had reverted to it as a surface owner. Hence, DER did not (and, indeed, could not) act as a condemnor under these circumstances." Opin. at 11a.

Most of the United States Supreme Court cases interpreting the Just Compensation Clause fall within two distinct classifications: physical occupation of private property and regulatory takings. The first category of cases requires courts to apply a clear rule. Where the government authorizes a physical occupation of property (or actually takes title) the Just Compensation Clause generally requires compensation. *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992), *citing Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). The facts of this case fall squarely within this first classification of takings.

Although the typical "taking" occurs when a government entity formally condemns a landowner's property and obtains the fee simple pursuant to its sovereign power of eminent domain, *see e.g., Berman v. Parker*, 348 U.S. 26 (1954), a "taking" may also occur without a formal condemnation proceeding or transfer of fee simple. "There is nothing on the face of the constitutional provision which confines its application to a taking of property under color of eminent domain, and, although it was undoubtedly aimed at the power of eminent domain, it nevertheless applies to all the sovereign powers of government which may be used to interfere with the quiet enjoyment of private property." P. Nichols, Law of Eminent Domain, §601, at 6-5 (1983).

Here, DER acted in its governmental capacity and under authority of law when it took title to Petitioners' property. Unlike a private landowner, DER had at its disposal the State's instrumentalities to effectuate its taking as well as the weight of the State's authority. Using this unassailable power, DER caused Petitioners' names to be removed from the property tax rolls as owners of the oil and gas estate and then added these oil and gas interests to the

Commonwealth's inventory of natural resources. DER then leased the oil and gas interests to Pennzoil for development and garnered fees under this lease arrangement. These acts deprived Petitioners of their property and constituted a taking under the Fifth Amendment.

The Court has frequently found "takings" outside the context of formal condemnation proceedings in cases where government action benefiting the public resulted in the use and enjoyment of private property. *See Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979) (navigational servitude allowing public right of access); *United States v. Dickinson*, 331 U.S. 745, 750-51 (1947) (property flooded because of government dam project); *United States v. Causby*, 328 U.S. 256, 261-62 (1946) (frequent low altitude flights of Army and Navy aircraft over property); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-416 (1922). In none of these situations can it be said that the government intended to take property through condemnation, yet a compensatory taking resulted.

Decisions of this Court are clear that intent is not the touchstone of a governmental taking, rather the pivotal consideration is whether the impact of the government's action on the property owner was to deprive him or her of substantially all beneficial use of the property or render the land useless for all purposes. "The Constitution measures a taking of property, not by what a State says, or what it intends, but by what it **does**. ... [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate ..." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in the original). If subjective intent were key, it would be a simple matter for a government to subvert the mandatory requirement of the Fifth Amendment.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a compensable taking. *See Pumpelly v. Green Bay Co.*, 20

L.Ed. 557 (1872); *Northern Transportation Co. v. Chicago*, 99 U.S. 635 (1879); *United States v. Lynah*, 188 U.S. 445, 468-70 (1903); *Western Union Telegraph Co. v. Pennsylvania R. R.*, 195 U.S. 540 (1904); *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 809-810 (1950); *YMCA v. United States*, 395 U.S. 85, 92 (1989) ("... government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation.").

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court affirmed

> ... the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

458 U.S. at 441.

Early commentators similarly viewed a physical occupation of real property as the quintessential deprivation of property. *See e.g.*, 1 W. Blackstone, Commentaries 139; J. Lewis, Law of Eminent Domain in the United States 197 (1888) ("Any invasion of property, except in case of necessity..., either upon, above or below the surface, and whether temporary or permanent, is a **taking** (footnote omitted; emphasis in the original)); 1 P. Nichols, Law of Eminent Domain 282 (2d ed. 1917).

In fact,

> [a]t one time it was commonly held that, in the absence of explicit expropriation, a compensable "taking" could occur **only** through physical encroachment and occu-

> pation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, **never** deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.

Loretto v. Teleprompter Manhattan CTV Corp. 458 U.S. at 426 n.5, *citing* F. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis in the original; footnotes omitted).

Based on substantial evidence submitted at trial, the trial court in this case correctly concluded that a taking had occurred in that the government had taken title to Petitioners' property and deprived them of their ownership rights without just compensation. The Commonwealth Court of Pennsylvania reversed the lower court's decision and, in doing so, unconstitutionally narrowed the right of a property owner in Pennsyvania to receive compensation for a governmental taking to situations in which the governmental agency is acting in the exercise of its formal eminent domain powers or incidental thereto. Opin. at 6a. This requirement directly conflicts with this Court's eminent domain decisions and is contrary to basic principles governing the Just Compensation Clause.

This Court has never required more than an act of physical taking by the government. "As soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has **already**

suffered a constitutional violation, and 'the self-executing character of the constitutional provision with respect to compensation' is triggered." *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 620, 654 (1981) (Brennan, J., dissenting) *citing United States v. Clarke*, 445 U.S. 253, 257 (1980), *quoting* 6 J. Sackman and P. Rohan, Nichols' Law of Eminent Domain §25.41 (rev. 3d ed. 1980).

This Court has consistently recognized that the just compensation requirement is not precatory: once there has been a "taking", compensation must be awarded. *See, e.g., Kirby Forest Indust., Inc. v. United States*, 467 U.S. 1, 5 ((1984); *United States v. Causby*, 328 U.S. 256, 267 (1946); *Jacobs v. United States*, 290 U.S. 13 (1933); *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304-306 (1923).

CONCLUSION

For the foregoing reason, the petition for certiorari should be granted.

Respectfully submitted,

Cheryl Flax-Davidson
Counsel of Record
5441 Chevy Chase Parkway, N.W.
Washington, D.C. 20015
(202)363-9723

Attorney for Petitioners

May 27, 1996

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CLARENCE MOORE and PENNLYCO, LTD.,	:	NO. 429 M.C. ALLOCATOR
PETITIONERS	:	DKT. 1995
v.	:	
	:	Petition for Allowance of
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Appeal from the Commonwealth Court

ORDER

PER CURIAM:

AND NOW, this 26th day of February, 1996, the Petition for Allowance of Appeal in the above matter is denied.

Madame Justice Newman did not participate in the consideration of this matter.

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CLARENCE MOORE and PENNLYCO, LTD.

v. No. 348 C.D. 1994

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Appellant.

The Commonwealth of Pennsylvania, Department of Environmental Resources (DER), appeals from the order of the Court of Common Pleas of Lycoming County dismissing DER's preliminary objections to the petition for appointment of viewers, filed by Clarence Moore and Pennlyco, Ltd. (collectively Moore) pursuant to section 502(e) of the Eminent Domain Code, Act of June 22, 1964, Special Sess., P. L. 84, as amended, 26 P.S. §1-502(e).

Moore, an oil and gas developer, and Pennlyco, Ltd., a Maryland corporation, are the owners as tenants-in-common of a fee simple absolute interest in the oil and gas estate of certain real property comprised of two contiguous parcels representing 6,841 and 18,780 acres located in Tiadaghton State Forest, Lycoming County. In 1933, the Central Pennsylvania Lumber Company conveyed the surface estate of this property to the Commonwealth, but reserved the oil and gas estate with a fifty-year access for development. In April 1975, Moore acquired from a successor to the lumber company 50% of the oil and gas estate of the parcels, and acquired the remaining 50% of the oil and gas estate in 1983

from Mobil Oil Company. Mobil later conveyed a 50% interest in the oil and gas estate to Kenneth Yates, who thereafter conveyed that interest to Pennlyco.

In October 1979, DER asserted to Moore that it would claim title to the oil and gas estate on March 28, 1983 because it believed that the lumber company's reservation of the estate was an estate for years, terminating fifty years from the date of the 1933 conveyance and resulting in title reverting to the Commonwealth. DER thereafter prepared maps outlining the subject rights as reserved for the Commonwealth in 1983, and these maps were made available to the public. In November 1983, DER publicly advertised a lease auction of the interest, notice for which stated that the Commonwealth considered itself to be owner of the oil and gas estate.

Pursuant to the auction, DER leased the oil and gas estate to C.E. Beck/Pennzoil, which lease generated income for DER from December 1984 through 1989 in the approximate amount of $297,000. In May 1984, Moore instituted a quiet title action to protect his ownership of oil and gas rights on the properties. In October 1984, DER conceded that Moore was owner of the oil and gas rights on the 6,841-acre parcel, but continued its claim of ownership regarding the remaining larger parcel. However, this Court in November 1989 held that Moore was the owner in fee simple absolute of the oil and gas estate of the larger parcel. *Moore v. Department of Environmental Resources (Moore I)*, 129 Pa. Commonwealth Ct. 628, 566 A.2d 905 (1989).

In October, 1992, Moore filed a petition for the appointment of viewers alleging that as a direct result of DER's claim of ownership, Moore was unable to lease, develop, or in any way derive income from the property between 1979 and 1989. DER filed preliminary objections to the petition averring that Moore failed to state a cause of action and challenging the allegation of a *de facto* taking. The trial court held hearings in May 1993 at which several experts testified on behalf of Moore as to the desirable nature of the property due to the proximity of large wells drilled by

other major oil companies which produce large amounts of natural gas; the value of the tract was due to the large area of land where there were various unique geological structures indicative of the entrapment of oil and gas; and the tracts of land had high potential for oriskany, a formation known to be productive of oil and gas.

The trial court found that Moore actively undertook to develop the oil and gas rights beginning in 1979 and always disclosed to potential investors or lessees DER's adverse claim to ownership; Yates, a business associate of Moore, attempted to market the property to potential investors starting in 1980, always advising the investors of DER's adverse claim; Moore, Yates, or parties acting on their behalf contacted approximately fifty-one companies involved in oil and gas development who were interested in the oil and gas interests but would not invest until title problems were cleared up. Eventually, once DER's adverse claim was removed from the parcels and Moore regained clear title, he was able to lease the oil and gas interests.

Based upon these findings, the trial court concluded that DER's assertion of an ownership interest in the gas and oil rights directly caused potential investors to decline offers by Moore to develop or lease the oil and gas, thus putting a cloud on Moore's title and effectively negating any business propositions to develop the rights. The trial court found that DER is clothed with the power of eminent domain, rejected the assertion that Moore failed to prove DER ever acted under its power to condemn, and noted that Pennsylvania courts have allowed landowners to recover for intrusions and loss of use and enjoyment of property resulting from government activity not done in the formal exercise of eminent domain.

As a result, the court found that Moore sustained his burden of proof through sufficient evidence to prove a taking of his oil and gas interests in the smaller parcel from October 3, 1979 to October 30, 1984, when DER conceded Moore's ownership; and in the larger parcel from October 3, 1979 until November 17, 1989, when this Court adjudicated title in favor of Moore. Accordingly,

the trial court dismissed DER's preliminary objections and DER appealed to this Court.

On appeal, DER challenges the trial court's determination that Moore stated a cause of action for a *de facto* taking. DER also contends that the trial court erroneously relied on inadmissible hearsay in making those findings, leading to its conclusion that a *de facto* taking had occurred. For the reasons which follow, we conclude that Moore has not stated a cause of action based on a *de facto* taking. We will therefore reverse.

In order to find a *de facto* taking, a court must consider whether a governmental entity, clothed with the power of eminent domain, has by its conduct substantially deprived the property owner of the use and enjoyment of the property. *Conroy-Prugh Glass Co. v. Department of Transportation*, 456 Pa. 384, 321 A.2d 598 (1974); *Elser v. Department of Transportation*, ___ Pa.Commonwealth Ct. ___, 651 A.2d 567 (1994).

DER contends that no *de facto* taking has occurred because (1) Moore has not suffered substantial deprivation of the beneficial use of his property, since no oil or gas has been removed; (2) Moore did not establish exceptional circumstances that deprived him of that beneficial use; and (3) DER was not acting while clothed with the power of eminent domain when, purporting to be the owner of the oil and gas estate, it granted a lease.

As this Court in *Berk v. Department of Transportation*, 168 Pa.Commonwealth Ct. 560, 566, 651 A.2d 195, 198 (1995) has recently said:

> There is no litmus formula to determine when government action will be deemed to have the effect of such taking. It has remained for the courts to provide, with case by case development, the needed doctrinal elaboration. *Filbert Limited Partnership Appeal*, 64 Pa. Commonwealth Ct. 605, 441 A.2d 1345 (1982). The United States Supreme court has taken a similar case by case approach to the question of what constitutes a taking within the

meaning of the Fifth Amendment to the United States Constitution, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

An analysis of the case law establishes that, in Pennsylvania, government action has been found to effect a *de facto* taking in limited and discretely defined circumstances. In defining those circumstances, our courts have fixed their "focus . . upon the nature of the complained of acts." *Enon Valley Telephone Co. v. Market*, 90 Pa. Commonwealth Ct. 53, 493 A.2d 800, 802 (1985) (citing *Condemnation of the Land and Property of Jacobs*, 55 Pa. Commonwealth Ct. 142, 423 A.2d 442 (1980)). In *Enon Valley* and *Jacobs* we upheld preliminary objections to complaints brought under the Eminent Domain Code. In *Jacobs*, the "[t]ownship unlawfully issued the building permits, improperly approved the subdivision, and wrongfully contributed to the design of the drainage plans" which caused serious drainage damage to the complaining property owners. We held these acts were not "purposeful and deliberate" and were "in no manner related or incidental to the Township's condemnation powers." *Id.* at 146, 423 A.2d at 443. As in *Enon Valley*, we quoted *Lutzko v. Mikris*, 48 Pa. Commonwealth Ct. 75, 79, 410 A.2d 370, 372 (1979) for the "well established" principle that "acts not done in the exercise of the right of eminent domain" and which "are not the immediate and necessary consequence of exercising that right cannot" be the basis of an action in eminent domain.[1]

[1] Thus, we have refused to allow recovery through eminent domain for injuries resulting from negligent acts and trespass committed by municipal bodies "clothed" with eminent domain powers. *See also Steckley v. Department of Transportation*, 46 Pa. Commonwealth Ct. 367, 407 A.2d 79 (1979), *aff'd* 494 Pa. 104, 429 A.2d 1112 (1981); *Culver v. Commonwealth*, 346 Pa. 262, 29 A.2d 531 (1943). Negligent acts, even those done by agents of the body condemning the complainants' property, are not actionable in eminent domain proceedings. *Culver*. To this extent, the boundaries of the Eminent Domain Code have been strictly circumscribed by our case law.

Other than where there has been physical intrusion into property or government activities in anticipation of condemnation, takings have been found "[w]hen deprivation of property occurs as a result of the enactment of laws," *Gardner v. Department of Environmental Resources*, 145 Pa.Commonwealth Ct. 345, 603 A.2d 279 (1992); that is, when "regulation goes too far, it will be recognized as a taking." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L.Ed. 322 (1922). Of course, Moore does not complain that DER's *regulatory* actions have deprived him of property. He brings his petition to appoint viewers pursuant to section 502(e) of the Code on the allegations that DER held itself out to be the owner of the oil and gas estate.

We hold that these allegations do not state a cause of action for a *de facto* taking because they do not make out a claim that DER exercised its power of eminent domain over that property. As we said in *Darlington v. County of Chester*, 147 Pa. Commonwealth Ct. 177, 180, 607 A.2d 315, 320, *appeal denied*, 531 Pa. 657, 613 A.2d 562 (1992), "[t]o proceed under section 502(e) of the Code, a *de facto* taking must result from a governmental body's actual exercise of the power of eminent domain ..."

This proposition is not idly stated, because not all compensable injuries suffered by property owners as the result of government action are takings, and not all lawful exercises of government power will suffice to state a *de facto* taking.[2] While it is true that the actual exercise of eminent domain is not a requisite to a *de facto* taking, where *de facto* takings have been found, either physical intrusion or the imminence or inevitability of the condemnation, as that term is statutorily defined, [3] has been an essential element.

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[2] *See Condemnation of 2719, 2721, and 2711 E. Berkshire Street*, 20 Pa. Commonwealth Ct. 601, 605, 343 A.2d 67, 69 (1975) ("the landowners' difficulties ... are more basic. They have failed to allege that the Department's actions are the result of the lawful exercise of its eminent domain power. It is well settled that acts not done in the exercise of eminent domain ... cannot be the basis of any claim in that proceeding.")

[3] "Condemn" means to take, injure or destroy private property by authority of law for a public purpose. 26 P.S. §1-201.

In *Conroy-Prugh*, the Department of Transportation held hearings and caused widespread publicity about its intended condemnation of certain property. These activities caused the landowners' commercial property to become unprofitable due to loss of tenants. Our Supreme Court found a *de facto* taking of these properties, which were in the path in a highway construction project. The Supreme Court termed it "a significant fact" that "the property owner alleges that the publicity about the *inevitable condemnation* caused a loss of tenants. 456 Pa. at 389, 321 A.2d at 600 (emphasis added).

Following *Conroy-Prugh*, in *Department of Transportation v. Pastuszek*, 55 Pa. Commonwealth Ct. 138, 141, 422 A.2d 1223, 1225 (1980), we quoted with approval the common pleas court's assessment of a *de facto* taking:

> The actions of the Commonwealth in preparing plans for the acquisition of properties in the bed of ramp C, announcing its intentions over a period of ten years, conducting meetings with affected property owners, public officials and community leaders, acquiring properties on either side of the Petitioner's property, making offers to other property owners in the immediate area, physically intruding upon the property of the Petitioner, lead this court to find that a *de facto* taking of the Petitioner's property had been damaged and a cloud placed upon it so as to adversely affect the Petitioner's beneficial use and enjoyment of that property.

In *McCracken v. City of Philadelphia*, 69 Pa. Commonwealth Ct. 492, 498, 451 A.2d 1046, 1049 (1982), we turned to the *Filbert Limited Partnership* case for guidance in deciding when a *de facto* taking will be found:

> [t]he theory of *de facto* taking has been developed in response to the reality that activities carried on

> incident to massive, complex and time-consuming programs launched by government may so substantially interfere with one's use and enjoyment of his property, as to inflict a compensable injury in a constitutional sense or as being within applicable statutory law, even though the power of eminent domain has not been formally exercised against the property in question and there has been no physical intrusion of it.

We held in *McCracken* that construction activities connected to building an elevated train, denying access and impeding access to properties, amounted to exceptional circumstances depriving the owners of the beneficial use of those properties, and a *de facto* taking had therefore occurred.

In *McGaffic v. Redevelopment Authority of the City of New Castle*, 120 Pa. Commonwealth Ct. 199, 548 A.2d 653 (1988), *appeal denied* 523 Pa. 644, 565 A.2d 1168 (1989), the trial court noted in its decision that this Court has found "activities incident to government programs may so pervasively interfere with use and enjoyment of property even where there has been no actual exercise of the power of eminent domain nor [sic] physical intrusion." *Id.* at 206; 548 A.2d at 656.[4] There, we concluded that the trial court's finding of a *de facto* taking was proper based on the facts that the authority publicized redevelopment of an area in which the commercial rental property stood; the authority announced a clear intention to acquire through eminent domain all the properties listed in a public notice; and it conducted an appraisal of the property and entered into a contract for its sale five years before the property was subsequently removed from the acquisition list.

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[4] *City of Hazleton v. Hudock*, 2 Pa. Commonwealth Ct. 670, 281 A.2d 914 (1971) was cited for this proposition. We held in that case that the approval and funding of an urban renewal project followed by notices to and negotiations with property owners, and acquisition by agreement of some parcels were not sufficient in themselves to establish a *de facto* taking.

By contrast, in *Florek v. Department of Transportation*, 89 Pa. Commonwealth Ct. 483, 493 A.2d 133 (1985), we held that no *de facto* taking occurred when the Department of Transportation exercised its rights as an easement holder by re-installing a drain pipe to a different depth within its easement over the property owners' land. We noted that if a taking occurred at all, it occurred when the drainage pipe was originally placed on the property then owned by a predecessor. In *Capece v. City of Philadelphia*, 123 Pa. Commonwealth Ct. 86, 552 A.2d 1147 (1989), we held that a residential property owner did not state a cause of action for a *de facto* taking because mere unmarketability is not a substantial deprivation "unless that unmarketability is *a result of the property's inevitable condemnation* such that would place a cloud on the property's title." *Id.* at 90, 552 A.2d at 1149 (Emphasis added).

It can be seen, then, that in those cases where *de facto* takings have been found absent physical invasion or appropriation of property,[5] the government body either exercised legislative or regulatory powers or engaged in activities that anticipated the acquisition or destruction of property for a public purpose;[6] that is, for "activities . . . incident to massive complex and time consuming programs launched by government to solve ... the problems that beset our society...." *Hudock*, 2 Pa. Commonwealth Ct. at 675, 281 A.2d at 917. These anticipatory activities-- for

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[5] In *Borough of Boyertown Appeal*, 77 Pa. Commonwealth Ct. 357, 466 A. 2d 239 (1983) we affirmed a trial court decision in which the court found an *actual* taking where the municipality made an unauthorized connection to privately owned water mains and supplied water to borough customers through those mains. We held that there was no showing of a *de facto* taking, although we agreed with the trial court's determination that the private water main owner suffered an "actual" taking, which we defined as that which occurs "when an entity having the power of eminent domain physically appropriates the possession or use of private property." *Id.* at 369, 466 A.2d at 245.

[6] Black's Law Dictionary defines public purpose as a term of classification to distinguish the objects for which the government is to provide from those which are left to private interest. A public purpose has as its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhibitors or residents [of a] political subdivision. Black's Law Dictionary 1107 (5th ed. 1979).

example, notice and publicity of intent to condemn, actual condemnation of surrounding properties or prolonged restriction of access to property-- amounted to exceptional circumstances depriving an owner of some of the value of his property.[7]

In the conduct which gives rise to the instant dispute, DER did not have as its object a government service or public improvement promoting the health, safety and welfare of Commonwealth residents. DER did not acquire or destroy Moore's subsurface rights for the purpose of leasing those rights, since the commercial development of oil and gas fields is not a government function. Rather, DER *claimed* albeit mistakenly an ownership interest in those rights which it believed had reverted to it as the surface owner. Hence, DER did not (and, indeed, could not) act as a condemner under these circumstances. With regard to its mandate to protect Commonwealth forests as a natural resource, DER is chartered with certain powers, Section 1902-A of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, added by Act of December 3, 1970, P.L. 834, *as amended,* 71 P.S. § 510-2(1).

§ 510-2. **Forest powers and duties**

The Department of Environmental Resources shall have the power, and its duty shall be:

(1) *To acquire*, in the name of the Commonwealth

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[7] That non-regulatory *de facto* takings have not been contemplated outside the context of formal Condemnation or public improvements is illustrated by the following statement from *Filbert Limited Partnership*:

> An ascertainable legal pattern emerges.... That pattern, translated into a working principle, may be stated thus: Where a property is designated for formal condemnation pursuant to a planned prospective public improvement, adverse interim consequences caused to the property by the prospect of condemnation will not constitute a *de facto* taking unless those interim consequences are that the owner is deprived of the use and enjoyment of the property or is subjected to the loss of property before formal condemnation can provide compensation. If there has been such an interim deprivation of use or exposure to loss then the principle of *de facto* taking becomes applicable to accelerate the time when the governmental authority must make compensation.

> *by* purchase, gift, lease, or *condemnation, and hold as State forests,* subject to the conditions of any such lease, and subject to such reservations, if encumbrances, as the department deems to be consistent with such holding, *any lands ... which,* in the judgment of the department, *the Commonwealth should hold,* manage, control, protect, maintain, utilize and regulate, *as State forests or for reforestation,* and adding to and extending the existing State forests. (emphasis added.)

DER is also given the power to purchase vacant or unappropriated lands to hold as state forests, 71 P.S. § 510 2(2); to hold, manage, develop and regulate state forest land for reforestation, soil conservation, and for water flow and fire control purposes. 71 P.S. § 510-2(3); to dispose of state forest land:

> and the said department is hereby empowered, to make and execute contracts or leases, in the name of the Commonwealth, for the mining or removal of any valuable minerals that may be found in said State forests ... whenever it shall appear to the satisfaction of the department that it would be for the best interests of the State to make such disposition of said minerals...

71 P.S. §510-2(6). DER's eminent domain powers as to state forests are limited to those circumstances found in section 510-2(1). While DER has the power under that subsection to acquire land by condemnation to hold as a state forest, it is not given the power to acquire land in order to develop oil and gas leases. Thus, DER did not "take" anything in the exercise of eminent domain power; it attempted to lease subsurface mineral mining rights. Such an attempt cannot constitute a *de facto* taking. *See Golding v. Township of New Britain,* 33 Pa. Commonwealth Ct. 635, 382 A.2d 509 (1978) (an entity without express or necessarily implied condemnation powers cannot effect a *de facto* taking).

Hence, we disagree with the trial court's statement that "DER does not act as any private landowner when it makes a claim to oil and gas interests under state forest land" because that statement is grounded on the incorrect premise that "DER was the specific agency granted by law the responsibility for acquisition of oil and gas land [and is] authorized to assert its power of eminent domain to acquire such interests". *In Re: Inverse Condemnation of 25,621 Acres of Oil and Gas Rights* (No. 92-02222, filed January 11, 1994), slip op. at 11. Simply put, DER was not acting as a condemner; it was acting as an owner.

The only issue before us, which we decide adversely to Moore, is whether DER, for a closed period of time, took the oil and gas estate of Moore. We neither decide nor express any opinion herein as to whether Moore has an action, or the nature thereof, against DER and/or its lessee for its asserted ownership of the subject property.

Accordingly, we will reverse the trial court's order dismissing DER's preliminary objections, sustain the preliminary objections of the DER and dismiss the petition of Moore for the appointment of viewers.

ORDER

AND NOW, this 6th day of June, 1995, the order of the Lycoming County Common Pleas Court at No. 92-02222, dated January 11, 1994, is reversed, the preliminary objections of the Department of Environmental Resources are sustained and the petition for the appointment of viewers by Clarence Moore and Pennlyco, Ltd. is dismissed.

APPENDIX C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CLARENCE MOORE and PENNLYCO, LTD.

v. No. 348 C.D. 1994

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Appellant.

ORDER

NOW, July 19, 1995, having considered appellees' application for reargument and appellant's answer in opposition, the application is denied.

BY THE COURT:

JAMES GARDNER COLINS, President Judge

APPENDIX D

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: Inverse Condemnation of 25,621 Acres of Oil and Gas Rights, Clarence W. Moore and Pennlyco, Ltd., Petitioners/Plaintiffs	:	No. 92-02222
vs.	:	CIVIL ACTION - LAW
Department of Environmental Resources of the Commonwealth of Pennsylvania, Respondent/Defendant	:	Preliminary Objections

OPINION AND ORDER

This matter is before the court for decision after an evidentiary hearing to determine whether a de facto taking by Respondent Department of Environmental Resources has occurred. The procedural background is as follows. Petitioners filed a Petition to Appoint a Board of Viewers on October 27, 1992, averring that as a direct result of DER's claim of ownership of Petitioners' oil and gas interest, they were unable to lease, develop or in any way derive income from that interest. DER filed prelimi-

On March 31, 1992, this court ordered a hearing to establish whether Petitioners' averments, if true, established a de facto taking under the Eminent Domain Code, 26 P.S. Section 1-101 et seq. A hearing was held before this court on May 20 and 21, 1993, to allow Petitioners to prove the allegations of their petition.

FINDINGS OF FACT

1. Petitioner Clarence W. Moore is an adult individual, residing at 5055 Northwest Seventh Street, Miami, Florida. Petitioner Pennlyco, Ltd., is a corporation organized and existing under the laws of Maryland, with offices at 117 West Patrick Street, Suite 300, Frederick, Maryland.

2. The Respondent is the Pennsylvania Department of Environmental Resources, hereinafter DER.

3. Petitioners are the one hundred (100%) percent owners, as tenants-in-common, of a fee simple absolute interest in 25,621 acres of the oil and gas estate of certain real property located in Tiadaghton State Forest, Lycoming County. The property is comprised of two contiguous parcels representing 6,841 acres and 18,780 acres.

4. Petitioners' ownership interest is evidenced by deeds recorded among the land records of Lycoming County at Book No. 755 Page 3, Book No. 1063 and Book No. 1953 Page 155.

5. DER is the owner of the surface estate of the same real property referred to in paragraphs three and four.

6. DER, acting in the name of the Commonwealth of Pennsylvania, is responsible for acquisition, management and regulation of lands and the oil and gas rights under those lands, as part of the state forest system for the public benefit. 71 P.S. Sections 510-2, 510-2(1).

7. DER is vested with power of eminent domain under Pennsylvania law. 71 P.S. Sections 510-2, 510-2(1).

8. In 1975, Clarence Moore acquired ownership in fee simple absolute of fifty (50%) of the mineral estate of the oil and

gas for the subject tracts by deed from Mobil Oil Company.

9. In 1983, Mr. More acquired ownership in fee simple absolute to the remaining fifty (50%) percent of the mineral estate of the oil and gas for the subject tracts by deed from Mobil Oil Company.

10. Mr. Moore conveyed a fifty (50%) percent interest in the mineral estate of the oil and gas to Kenneth Yates, deed recorded among Lycoming County Land Records at Book No. 1550, Page 283.

11. Kenneth Yates conveyed a fifty (50%) percent interest in the mineral estate of the oil and gas to Petitioner Pennlyco, Ltd., deed recorded among Lycoming County Land Records at Book No. 1959, Page 167.

12. At a meeting at DER's offices on October 3, 1979, DER, through its representative John Walker, first asserted to Mr. Moore that pursuant to its lawful authority, on March 28, 1983, it would be the owner of Petitioners' oil and gas rights as part of its state forest system. On that date, all of Petitioners' ownership interest in the subject rights would be extinguished and DER would have the sole right to develop these rights as the exclusive owner thereof.

13. Mr. Walker told Mr. Moore that DER's records showed that the Commonwealth would become owner of the oil, gas and coal on March 28, 1983, and it would be a fee ownership.

14. In 1979, DER prepared maps that outlined the subject rights as reserved for the Commonwealth in 1983. These maps were available to the public.

15. After March 28, 1983, DER took control of the property and conducted itself as exclusive owner of Petitioners' oil and gas rights as part of the state forest system.

16. Petitioners' names were removed as owners of the property rights on the tax rolls of Lycoming County as of December 20, 1983.

17. In November 1983, DER publicly advertised a lease/auction of the interest.

18. DER's Notice to Bidders for the auction states that the Commonwealth considered itself to be the owner of the oil and gas rights.

19. DER leased the oil and gas interest to C.E. Beck/ Pennzoil.

20. Income was generated from December 1984 until 1989 in the amount of approximately $297,000.00.

21. In May of 1984, Petitioners instituted litigation to Quiet Title to protect and vindicate their ownership of oil and gas rights.

22. DER's claim of ownership to the 6,841 acres of oil and gas rights continued until October 30, 1984, when DER conceded that petitioners were the owners in fee simple absolute of the 6,841 acres.

23. DER's claim of ownership to the 18,780 acres continued until November 17, 1989, when, as a result of the litigation to quiet title, the Commonwealth Court of Pennsylvania declared and upheld that petitioners were owners in fee simple absolute of 18,780 acres of oil and gas.

24. Various experts testified, at the hearing and by deposition, as to the valuable nature of the subject tract of land.

25. Clarence Moore has been actively engaged in the oil and gas business since 1950, and is experienced in oil and gas development.

26. C. David Rainey is the president of IDC Drilling Company, an independent oil and gas production and exploration company that is active in Pennsylvania. He testified to the desirable nature of the property due to the proximity of two big wells drilled by other major oil companies which produce large amounts of natural gas.

27. Jack Crichton is an expert in oil and gas development, leasing and production. He testified that the large area of land was important to the value of the tract, since there was the possibility of several geological structures indicative of the entrapment of oil and gas.

28. Mark Cable, an oil and gas geologist, testified to the unique geologic structure of the Lycoming County land.

29. George Kubisty is the vice-president of Berea Oil and Gas Company, an independent oil and gas production company active in Pennsylvania. He testified that the Lycoming County tracts of land had high potential for oriskany, a formation known to be productive of oil and gas.

30. Mr. Moore actively undertook to develop the oil and gas rights starting in 1979.

31. Mr. Moore always disclosed to potential developers or lessees DER's adverse claim to ownership beginning in 1983.

32. Kenneth Yates is an attorney with a focus on representation of real estate and oil and gas ventures. He is also a business associate of Mr. Moore. Mr. Yates attempted to market the property to potential investors starting in 1980, always advising the investors of DER's adverse claim.

33. Mr. Moore and Mr. Yates, or parties acting on their behalf, contacted some fifty-one (51) companies involved in oil and gas development who were ready and willing to invest in oil and gas development. See Plaintiff Exhibit 29, 86, 87, and 90 for a comprehensive list of companies contacted.

34. Mr. Yates testified that almost all the companies were interested in the subject oil and gas interests.

35. Potential investors declined to go forward on any development of leasing deals upon hearing of DER's claim.

36. William Thomas is an independent consultant active in oil and gas leasing for numerous companies. He testified that he tried to market the rights to Equitable, Texaco, Fairway Production, Douglas Energy, Exxon, Miller Drilling Company, and Ray Petroleum, however, the title problem concerned these companies, so they lost interest.

37. IDC Drilling Company was interested in drilling a well subject to an agreement that a sufficient amount of time would be available to explore and develop potential oil reserves beyond March 28, 1983.

38. The offer from IDC never resulted in the leasing or development due to DER's adverse claim.

39. Mark Cable testified that the oil and gas business is a long-term proposition and 2, 3, or 4 years is too short a time to get any drilling done.

40. Mr. Cable stated that whenever there was anything less than clear title, no company will invest until title is cleared.

41. Jack Crichton testified that clear title to ownerships of oil and gas is very important, and given the adverse claim of DER, he would not lease tracts from Petitioners.

42. Mr. Yates testified that every company he contacted that initially showed interest declined to go forward after advisement of the adverse claim. The companies invited him to resubmit the tracts for review after the title problem was cleared.

43. Once DER's adverse claim was removed from the 6,841 acre parcel and Petitioners regained clear title, Petitioners were able to lease that oil and gas interest to Pennzoil.

DISCUSSION

To find a de facto taking in Pennsylvania, the court must consider whether the governmental entity, by its conduct, has substantially deprived the property owner of the use and enjoyment of his or her property. *Conroy-Prugh Glass Company v. Commonwealth*, 321 A.2d 598 (Pa. 1974). The deprivation must be the direct and necessary consequence of the actions of the entity having the power of eminent domain. *McCracken v. City of Philadelphia*, 451 A.2d 1046 (Pa. Comwlth. 1982). Substantial interference with property rights by the government is sufficient to constitute a de facto taking without an actual exercise of eminent domain, physical intrusion, or any precondemnation activity. *McGaffic v. Redevelopment Authority*, 548 A.2d 653 (Pa. Comwlth. 1988). When the actions of the government result in the property owner's inability to dispose of commercial property or realize any income from it, there has been a de facto taking. *In re Department of Transportation of Right-of-Way*, 455 A.2d 229 (Pa. Comwlth. 1983). *See Conroy-Prugh Glass Company*, 321 A.2d at 598.

The burden of proof is on the Petitioners. Each case turns

on its unique factual matrix. Specifically, Petitioners must show that there are exceptional circumstances which substantially deprive them, as owners, of the beneficial use and enjoyment of their property, that the substantial deprivation was occasioned by actions of an entity clothed in the power of eminent domain, that the substantial deprivation was the result of the exercise of that power, and damages occurred which are the immediate, necessary and unavoidable consequence of the exercise of that power. *Darlington v. County of Chester*, 607 A.2d 315 (Pa. Cmwlth. 1992).

Upon review of all testimony and other evidence submitted during the hearing, the court concludes that there is sufficient evidence to support a finding of a de facto taking by Respondent DER. The facts support the finding that in October of 1979, DER informed Petitioner Clarence Moore that it owned a reversionary interest in Petitioners' oil and gas interest. Pursuant to that reversionary interest, DER claimed it would own, and take full control of, this interest in fee simple absolute on March 28, 1983. Petitioners disputed DER's interpretation of its reversionary claim. DER thus asserted an ownership interest in the gas and oil rights, directly causing potential investors to decline offers by Petitioners to develop or lease the oil and gas. Due to DER's actions, a cloud was put on Petitioners' title, effectively negating any business propositions to develop the rights and provide Petitioners with any income from their interest.

The bases for this court's conclusions are set forth below.

I. Power of Eminent Domain

First, the court finds DER to be clothed with the power of eminent domain. Pursuant to public law, DER is vested with authority to acquire lands by condemnation and manage and develop the oil and gas under those lands, all as part of its duties to hold state forests in the name of the Commonwealth. 71 P.S. Section 510-2, 510-2(1), 510-6(1). DER states that it was not acting in the exercise of eminent domain, but rather, as an owner

by way of sale. The language of the Eminent Domain Code defines eminent domain simply as that which occurs when an entity clothed with power of eminent domain takes, injures or destroys private property for public use. 71 P.S. Sections 1-207(3), 1-201(5). In the instant case, DER was not merely any governmental agency claiming title to Petitioners' oil and gas rights, but the specific agency granted by law the responsibility for acquisition of oil and gas, and of state forest lands, authorized to assert its power of eminent domain to acquire such interests. DER certainly may act as any other proprietary owner when seeking to buy a building for its offices, for instance, however DER does not act as any private landowner when it makes a claim to oil and gas interests under state forest lands.

DER argues Petitioners failed to prove the Department ever acted under its power to condemn or ever planned or announced plans to exercise its power to condemn. Case law does not require a formal condemnation. Pennsylvania courts have allowed landowners to recover for intrusions, interferences, and loss of use and enjoyment of property resulting from government activity not done in the formal exercise of eminent domain. *McCracken*, 451 A.2d at 1046, *McGaffic*, 548 A.2d at 653.

II. Petitioners were Substantially Deprived of the Use and Enjoyment of the Property.

Petitioners, as owners, have demonstrated that DER's conduct, in asserting an ownership interest in their oil and gas rights, destroyed the potential for income and investment. For the 6,841 acre parcel, the time frame is 1979-1984, when DER conceded Petitioners' ownership. For the 18,780 acre parcel, the time frame is 1979-1989, when the Commonwealth Court adjudicated title in favor of Petitioners.

Petitioners have produced credible evidence to the effect that the subject oil and gas interests are a valuable commercial property right, for the reasons that they are below the surface of a

large contiguous tract of land located in Pennsylvania that contains potentially substantial reserves of oil and gas. Experts in oil and gas development and potential investors testified to the desirability of the acreage for commercial uses.

C. David Rainey, president of IDC Drilling Company testified that this acreage was a very desirable piece of property, since nearby there were two wells drilled by other major oil companies, both of which produce enormous quantities of natural gas. N.T. 5/20/93 p. 57, 99-100. Jack Crichton, oil and gas development expert, testified that the geology of the land showed a number of anticlines, which entrap oil and gas. N.T. 5/21/93 p. 5. Mark Cable, an oil and gas geologist, testified this area was a ripe piece of property. The Lycoming County land is a unique geologic structure with prolific production immediately to the north. Deposition of Cable, p. 22, 10. Mr. Cable expressed his opinion that there were high hopes for the subject acreage, as it had potential for oil and gas production. Deposition of Cable at p. 10, 11.

George Kubisty, vice-president of Berea Oil and Gas Company, testified that the area of Lycoming County had high potential for oriskany, a formation of rocks underground known to be productive of oil and gas development. Deposition of Kubisty, p. 10. Clarence Moore testified that he focused on the acreage in Lycoming County due to the fact it was a huge tract structured along certain anticlines, and was of interest to persons involved in the oil and gas business. N.T. 5/20/93, p. 18.

These witnesses are found by the court to be credible as to the valuable nature of the subject acreage.

Petitioners have demonstrated by substantial evidence they were not able to cultivate interest in investors to make a deal to develop the oil and gas, due to DER's asserted ownership claim.

Clarence Moore testified that after October 1979, when he was informed of DER's claim of ownership, he was obligated to tell any contacts he made about the shadow on the title. N.T. 5/20/93 p. 26. Mr. Moore stated that no one was interested in working on a property if they were going to lose it in two or three years. N.T.

5/20/93 p. 26. He said he found that people he dealt with simply said in the face of the claimed reservation from DER, they had no interest. N.T. 5/20/93 p. 33. Mr. Moore personally contacted approximately fifteen (15) companies and made efforts to develop the property before 1983. N.T. 5/20/93 p. 33.

Kenneth Yates testified he contacted thirty-six (36) different companies regarding development or leasing of the oil and gas. N.T. 5/21/93 p.32. In November 1984, after DER withdrew its adverse claim of title to the 6,841 acre parcel, Mr. Yates successfully leased property to Pennzoil Company. N.T. p. 39, 40. He was never able to accomplish a lease or development of any of the parcels contained in the 18,780 acre tract. N.T. p. 39.

Jack Crichton testified that title to ownership of oil and gas is vital, because if clear title does not exist substantial investment of money could be lost upon discovery of less than sole ownership. N.T. 5/21 p. 6. Mr. Crichton stated he would absolutely not lease tracts from Petitioners given the adverse claim of DER. N.T. p. 7. In addition, Mr. Crichton testified that no company would be able to do all the work necessary to produce anything in the time period that was left before DER would take control in March 1983. N.T. p. 6.

David Rainey testified that his partners were very substantial European investors, interested in oil and gas rights in the United States, N.T. 5/20/93 p. 65, however, no deal came to fruition due to DER's adverse claim. N.T. p. 84. In October of 1981, Mr. Rainey's company, IDC Drilling, offered to Mr. Moore to move a rig on the property and drill at least one well, subject to an agreement that a sufficient period of time would be available to develop the property, beyond the period that remained until March 1983. Plaintiff Exhibit No. 40. Mr. Moore testified it was clear that IDC required more time than the limited time that remained and so the offer from IDC never resulted in any leasing or development due to DER's position that Mr. Moore did not own the property. N.T. 5/20/93, p. 34, 36-37.

John Page, vice-president of IDC, testified that one of the

conditions for a project to move forward was clear title to interest. n.T. 5/20/93 p. 105. If DER had not placed a claim against Mr. Moore's interest, the project would have gone forward if Mr. Page had anything to do with it, due to the fact it was a good project. N.T. p. 107.

Mark Cable testified that whenever there is anything less than clear title nobody is going to invest a dime until title is cleared. Deposition of Cable, p. 11. Mr. Cable touched base with several oil and gas development parties, but they did not pursue any further because of the cloud. Cable, p. 33. Mr. Cable's interest in the property moved to the bottom of his list as to any interest in approaching investors. Cable, p. 11. The short time period left before DER's adverse claim took effect was not good for the oil and gas business. In the oil and gas business, it is very difficult to gain back the large investment of capital necessary to develop oil and gas in that three (3) year space of time. Cable, p. 11. N.T. 5/21/93 p. 4-6.

George Kubisty, who leases oil and gas interests, testified that a title problem would have deterred further investigation into the project and further review. Deposition of Kubisty, p. 23. Other deals were coming together elsewhere, and he did not like to pursue title problems, as a rule. Kubisty, p. 29.

William Thomas, active in leasing oil and gas rights for independent oil and gas companies, testified he had some companies interested, but when he advised them of the adverse claim, they were no longer interested. The fact that the title problem could not be solved killed Mr. Thomas' ability to lease the property to the companies. Deposition of Thomas, p. 15, 16.

Accepting the testimony of the witnesses as credible, it is the court's conclusion that Petitioners were substantially deprived of the use and enjoyment of the property. After October 3, 1979, Petitioners tried to market and develop their oil and gas interest, but were unable to do so. Approximately fifty (50) companies refused to participate in any lease or development of the oil and gas, after being informed of DER's adverse claim and prospective taking of

Petitioners' property, on March 28, 1993. Clear title to these rights appears to be an important factor for consideration for the various oil and gas companies, who go through much time and expense when embarking on a venture such as that proposed by Petitioners.

DER argues that Petitioners cannot meet their burden of proving substantial deprivation, since Petitioners could have found a lessee before March 28, 1983. However, the testimony is clear that the time frame October 1979 to March 1983 was not long enough for potential investors to perform all the studies that were necessary before coming to a decision whether to go forward with a project. In addition, these companies would be unable to realize a return of the investment in that limited time period. Companies were not interested in any title entanglements. Due to DER's adverse claim, Petitioners lost their potential investors. The court finds sufficient evidence of substantial deprivation.

III. Substantial Deprivation Resulted in Damages Which are the Immediate, Necessary and Unavoidable Consequence of DER's Eminent Domain Power.

After March 28, 1983, DER divested Petitioners of title to their oil and gas interest, and thereafter exercised control over it as the exclusive owner. Petitioners were removed as owners from the tax rolls of Lycoming County as of December 20, 1983. The Commonwealth held itself out to be the owner of the oil and gas interest, publicly advertising a lease auction of the rights. Testimony of John Walker, N.T. 5/21/93, p. 109-110. DER sent out a bid notice requesting interested bidders to submit bids on the tracts. n.T. 5/21/93, p. 109-110. DER leased the oil and gas interest of C.E. Peck/Pennzoil. N.T. 5/21/93, p. 112-113, 155-156. DER generated income by receiving payments from December 1984 until 1989 from leasing the subject oil and gas interest in an amount of approximately $297,000. N.T. 5/21/93, p. 165.

In May of 1984, Petitioners instituted a quiet title action to ascertain the rightful ownership of the interest. Petitioners sug-

gested the proceeds from the leasing of the interest of Pennzoil be placed in escrow pending outcome of the action, however DER did not acquiesce to this suggestion. N.T. 5/21/93, p. 59-61, Deposition of Beck, p. 30-31. Ultimately, the Commonwealth Court found title in favor of Petitioners. *Moore v. Commonwealth, Department of Environmental Resources*, 566 A.2d 905 (Pa. Comwlth. 1989).

Based on these facts, the court finds that Petitioners suffered damages as a direct consequence of DER's actions. Petitioners were unable to realize any income from their property interest during this time DER claimed ownership, and during the time DER took control of the property, Petitioners were unable to use or enjoy their property in any manner.

In summation, based on the whole of the testimony and evidence presented at the hearing, the court finds Petitioners have sustained their burden of proof through sufficient evidence to prove a taking of Petitioners' oil and gas interest from October 3, 1979 to October 30, 1984, for the 6,841 parcel, and from October 3, 1979 until November 17, 1989, for the 18,780 acre parcel. For these reasons, the preliminary objections of Respondent DER are dismissed.

ORDER

AND NOW, this 11th day of January, 1994, the Preliminary Objections of Respondent DER are DISMISSED.

By The Court,

Kenneth D. Brown, J.

Supreme Court, U.S.
FILED
JUL 18 1996
CLERK

No. 95-1916

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CLARENCE MOORE and PENNLYCO, LTD.,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL A. TUFANO
(Counsel of Record)
General Counsel
Commonwealth of Pennsylvania
Office of General Counsel
225 Main Capitol
Harrisburg, PA 17120
(717) 787-2551

VIRGINIA J. DAVISON
WILLIAM W. SHAKELY
Office of Chief Counsel
Department of Conservation and
Natural Resources
P.O. Box 8767
Harrisburg, PA 17105-8767
(717) 772-4171
Counsel for the Commonwealth of Pennsylvania, Department of Conservation and Natural Resources, Respondent

QUESTIONS PRESENTED

1. Does a state statute which provides a statutory remedy only for takings resulting from the government's use of eminent domain powers, where other remedies exist for other types of taking, violate the Fifth and Fourteenth Amendments to the United States Constitution?

2. Has a court properly dismissed a takings claim where the litigant has not proved either that his property was affected by any sovereign power or that it has been physically occupied by the government?

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Statutes

Pennsylvania Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §1340.101 *et seq.* 1

Pennsylvania Eminent Domain Code, Act of June 22, 1964, Sp. Sess., P.L. 84, 26 P.S. §1-101 *et seq.* .. 3,4,7,8,10-11

Respondent Commonwealth of Pennsylvania, Department of Conservation and Natural Resources ("Department"),[1] hereby opposes the Petition for Writ of Certiorari filed by Clarence Moore and Pennlyco, Ltd. ("Moore").

RESPONDENT'S STATEMENT OF THE CASE

Factual and Procedural Background

The Commonwealth of Pennsylvania (the "Commonwealth") owns and manages the Tiadaghton State Forest in north central Pennsylvania. The Commonwealth, by its Department of Forests and Waters, predecessor agency to the Department of Environmental Resources and the Department of Conservation and Natural Resources, purchased 25,261 acres of property from the Central Pennsylvania Lumber Company in 1933. This land is now part of the state forest.

Moore owns oil and gas which underlie some of the acres purchased from the lumber company. In 1979, he visited the offices of the Department to inquire about what was necessary to "develop" or mine the oil and gas on the property. At his meeting with the Department's minerals manager,

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[1] At the time of the trial of the matter at issue, the duties of the present Department of Conservation and Natural Resources were performed by the Commonwealth's Department of Environmental Resources ("DER"). In 1995, pursuant to the Pennsylvania Conservation and Natural Resources Act, Act of June 28, 1995, P.L. 89, No. 18, 71 P.S. §1340.101 *et seq.*, the Pennsylvania General Assembly divided DER into two agencies, the Department of Environmental Protection and the Department of Conservation and Natural Resources. The Department of Conservation and Natural Resources now manages the Commonwealth's state forests.

Moore and the manager discussed the meaning of the reservation clause in the 1933 deed. The Department's interpretation of the clause was that the lumber company would own the minerals and have access to them for fifty years from the time of the grant of the surface to the Commonwealth, that is, until March 1983. In March 1983, the Department believed, all the reserved property would revert to the Commonwealth.

While he did not disagree at the time, Moore later formulated a different interpretation of the reservation clause. Some time after his initial meeting with the Department, Moore decided that the reservation was intended to give the lumber company permanent ownership of the mineral estate, including access for development via the surface.

The Department, confident of its interpretation of the 1933 deed, acted on requests made by gas companies that the gas and development rights be offered at a bid sale. The sale was held in December 1983. Pennzoil, the successful bidder, once apprised of Moore's interpretation of the reservation clause and threatened by Moore with a lawsuit, had an independent title search performed. The search resulted in a formal opinion by the title company's legal counsel to the effect that 18,780 of the acres of oil and gas clearly was the property of the Commonwealth but the ownership of 6,841 acres was not clear. After reviewing the title company's work, the Department removed the 6,841 acres from its lease offering. In November 1984, Pennzoil went ahead with its plan to lease the 18,780 acres about which its consultant was confident and entered into a ten-year oil and gas development lease with the Department, paying a rent for the surface and promising a royalty on all oil and gas removed from the ground.

Moore presented, by way of petition, his theory of ownership to the Commonwealth's Board of Property, the administrative tribunal which hears challenges to Commonwealth claims to real property. The Board held that the Department's interpretation of the 1933 deed was correct, that is, as of March 1983, the Department owned the 18,780 of oil and gas acres in fee. Moore appealed that holding to the state's Commonwealth Court. In its opinion titled *Moore v. Department of Environmental Resources*, 129 Pa. Commw. Ct. 628, 566 A.2d 905 (1989), the Commonwealth Court set forth its interpretation of the deed: Moore owned the oil and gas, but his right to use the surface for access for development had expired in March 1983.

Pennzoil never developed the oil and gas. The company's lease with the Department required that development activities be commenced in order for the lease to remain in force. As a result, the lease lapsed before the Commonwealth Court had issued its opinion, but after Pennzoil had paid the Department about $297,000 in rent.

Moore brought suit against the Department in two fora, the Lycoming County Court of Common Pleas and the Board of Claims, the tribunal which hears contract claims brought against the Commonwealth. In the Board of Claims action, which is still pending, Moore seeks to recoup the money paid to the Department by Pennzoil as well as an amount which Moore claims is the worth of the mineral estate.

Moore brought his takings claims in the trial court under Section 502(e) of Pennsylvania's Eminent Domain Code, Act of June 22, 1964, Sp. Sess., P.L. 84, 26 P.S. §1-101 *et seq.* (the Eminent Domain Code). Sometimes referred to as the "*de facto* takings" provision, Section 502(e) authorizes a

condemnee to seek damages for the uncompensated use of the eminent domain power.

Over the Department's objection that Moore had failed to state a cause of action under the Eminent Domain Code, the trial court found that Moore's oil and gas had been taken from 1979 to 1989, beginning with the Department's assertion that it would own the mineral estate in March 1983 and ending with the termination of Pennzoil's lease.

The Department appealed the trial court's determination to Commonwealth Court, which agreed with the Department that Moore had no cause of action for a *de facto* eminent domain taking. Expressly declining to decide whether Moore had a case under some other theory, the Commonwealth Court dismissed the claim brought under the Eminent Domain Code.

Moore requested that the Commonwealth Court reconsider its decision, which the court, without comment, refused to do. Moore also unsuccessfully petitioned the Pennsylvania Supreme Court to hear an appeal from the decision of the Commonwealth Court. The instant petition followed.

SUMMARY OF THE ARGUMENT

The Commonwealth Court was correct in finding that Moore's takings complaint, brought under the "*de facto* takings" provision of the Pennsylvania Eminent Domain Code, should be dismissed. Moore simply failed to state a cause of action under the statute. In order to find a taking under the Code, a court must find that the government used its eminent domain authority to affect the property in question. In order to use the Code's remedies for takings effected by the police

power, the court must be presented with an established taking found by a board or court acting under the appropriate statutes.

Moore presented no evidence to the Lycoming County Court of Common Pleas that the Department used its eminent domain authority or any regulatory power in regard to his oil and gas. The Department never occupied or in any way deprived the defendants of their property. All the Department's actions in regard to the oil and gas arose from a contract which gave Moore fifty years of full access to the oil and gas until March 1983, when he lost the right to use the Department's surface land.

The Department leased oil and gas development rights to Pennzoil, whose consultant read and interpreted the various deeds which concerned the ownership of the oil and gas throughout the years and reached the conclusion that the Department owned the oil and gas at issue. The Department's actions, either before or after March 1983, did not prevent Moore from offering the rights to the oil and gas to a customer of his own, had he been able to find one. Neither the Department nor any agent physically intruded upon or removed the oil and gas. Precedent which addresses physical occupation as taking does not apply.

If there is a claim of a taking as a result of some other mechanism, that claim must be examined by the relevant procedure and in the appropriate forum. Those procedures and their proper fora have been established by the appellate courts and are available to claimants.

The Department did not take Moore's oil and gas. Rather, the Department acted as an owner who after acquiring its property by purchase, put its property to proper use.

ARGUMENT

A. Takings Law in Pennsylvania

Government entities in Pennsylvania can take private property by two mechanisms: by the declared or undeclared use of the eminent domain authority or by a regulatory action which eliminates all the owner's beneficial use of the property, *Machipongo Land and Coal Company, Inc. v. Department of Environmental Resources*, ___ Pa. ___, 676 A.2d 199 (1996). These are the same mechanisms which this Court has recognized. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

B. The Petitioner's Claims

1. Taking by the Use of the Eminent Domain Power.

Moore contends that he has suffered what has come to be known in Pennsylvania as a "*de facto*" taking. He offers a two-fold explanation of his contention. First, he claims that his property was taken as a result of the Department's use of certain unnamed "unassailable powers," wielded under "authority of law" (Petition, p. 7). Second, he points out that physical occupation by government is always a taking and, in so doing presents the unstated but necessary implication that the Department physically occupied the oil and gas (Petition, pp. 8-10).

The *de facto* takings concept comprehends undeclared takings effected by the actual but undeclared use of the

eminent domain power.[2] The *de facto* takings provision of the Eminent Domain Code states:

> Section 502(e). If there has been a compensable injury suffered andno declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form for in subsection (a) of this section, setting forth such injury.[3]

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[2]The Commonwealth Court has said in *dicta* that the *de facto* takings remedies may be available to the property owner whose property has been established by the appropriate court to have been taken by the government's use of its police powers. Claims of taking by overly burdensome environmental regulations are heard and decided by the Environmental Hearing Board, zoning challenges by the Common Pleas Court pursuant to the Municipal Planning Code, and legislative challenges by the Commonwealth Court. Once a taking is found, compensation due may be determined and awarded by the "*de facto* takings" remedies of the Code. *Machipongo Land and Coal Company, Inc. v. Department of Environmental Resources, supra,* and *Beltrami Enterprises, Inc. v. Department of Environmental Resources,*159 Pa. Commw. Ct. 72, 632 A.2d 989 (1993).

[3]The subsection referred to sets forth the method by which the condemnee requests viewers, whose task it is to determine the value of property which has previously been determined by a court of competent jurisdiction to have been taken. Moore's original action was a petition for a board of viewers to which the Department filed objections. The objections were based on the Department's view that Moore's property had not been determined to have been taken and had not, as a matter of fact and law, been taken by the Department's use of its eminent domain authority. The relief requested was dismissal for failure to state a cause of action under Section 502(e) of the Eminent Domain Code. The refusal to dismiss was the sole question before the Pennsylvania appellate courts, which agreed with the Department.

A compensable injury comprises specific factual elements, which have been clearly set forth by the state courts. The Pennsylvania Commonwealth Court opinion being challenged here sets forth and explains those elements, all of which are necessary for a case to fall within §502(e). Simply stated, the governmental entity must have substantially deprived the property owner of the use and enjoyment of his property as a result of the use of the eminent domain power.

Taking by the undeclared use of eminent domain may manifest itself in physical occupation or in the inability of the owner to gain the commercial benefits he intended. The Commonwealth court examined only one issue in *Moore v. Department of Environmental Resources*: whether the Department had exercised its power of eminent domain to affect the property. Finding that there had been no use of that authority, Commonwealth Court agreed with the Department that Moore had failed to state a cause of action and dismissed the case.

The Commonwealth Court did not insist that the use of the eminent domain power be formally declared, as Moore has implied. The court did recognize, however, that, except for the established regulatory deprivations discussed above, an alleged deprivation remediable under the Eminent Domain Code must result from some exercise of eminent domain authority, whether formally acknowledged or inferred from the factual circumstances.

The Commonwealth Court was correct in finding the necessary evidence of use of the eminent domain power missing and in determining that Moore had not, therefore, suffered an injury compensable under the Eminent Domain Code.

2. Physical Occupation

In his Petition for Certiorari, Moore does not directly confront the Commonwealth Court's holding concerning the appropriate use of eminent domain procedures, but instead appears to argue that the Department physically occupied the oil and gas estate.

It is true, as the petition states, that permanent physical occupation of property has traditionally been an index of taking. What is quite obviously not true, however, is that the Department physically occupied Moore's oil and gas estate. The Department did not invade the oil and gas estate or remove any oil and gas from the premises; nor did it take any action to prevent oil or gas from leaving the 18,780 acre underground area or from being removed by anyone else, including by the common method of sinking a well on neighboring property.

Instead, after informing the relevant public, namely potential lessees, that it believed but could not guarantee that it was the owner of the oil and gas, the Department leased the development rights to a sophisticated company which independently determined that it was leasing from the proper party. Further, the Department did not lease the property to Pennzoil until the end of 1984. The Department's connection to the property was even more attenuated from 1979 to 1983, the only years Moore had the right to use the surface for development activities.

Neither the trial court nor the Commonwealth Court found that there was any physical intrusion. Although the Commonwealth Court did include in its opinion the observation that physical occupation is taking, they proceeded to find that no taking had occurred. Clearly, the appellate

court eliminated physical occupation of Moore's property from its analysis (Petition, p. 5a).

Pennsylvania courts have recognized that true physical occupation is a taking and that takings are compensable. However, there is no constitutional insult as a result of this dismissal because the facts do not indicate any physical intrusion or occupation.

3. The Relevance of the Department's Mistaken Interpretation of the Deed.

Moore also implies that the Commonwealth Court has held that a taking of his property does not require compensation because the taking occurred as the result of a mistake. This drastically misstates the holding below, which is that there was no *de facto* taking because there was no use of the eminent domain power and no other manifestation of taking. This argument is another in the series of arguments which mischaracterize the Commonwealth Court's opinion. This Court should not be misled.

C. Moore's Claim is Not One Which Should Invoke Review by this Court.

Moore originally brought his claim under the Pennsylvania Eminent Domain Code. He has not suggested that the Code itself violates the United States Constitution. Rather, he argues that the Commonwealth Court's opinion holds that a taking requiring compensation cannot result without the formal, declared use of eminent domain authority. The opinion below states nothing of the kind. The court merely reiterated that eminent domain, in one of its characterizations, must be an element of any situation in which

the procedures of the Pennsylvania Eminent Domain Code are invoked. The Commonwealth Court specifically pointed out that it was holding only that Moore had not presented a claim under the Eminent Domain Code. The Pennsylvania courts and legislature have established procedures for property owners who believe that their properties have been taken by other mechanisms or have been affected in ways that do not involve takings. *Machipongo, supra; Gaebel v. Thornbury Township,* 8 Pa. Commw. Ct. 399, 303 A.2d 57 (1973); *Department of Transportation v. Castillo,* 14 Pa. Commw. Ct. 22, 321 A.2d 394 (1974).

Finally, and most telling, the Petition presents none of the traditionally recognized grounds on which this Court has based a grant of certiorari. See Sup. Ct. R. 10. Although Moore gives the impression that this Pennsylvania decision conflicts with United States Supreme Court decisions, it absolutely does not. There has never been a decision by this Court that government action which does not involve the use of eminent domain amounts to a taking compensable under the procedures of any eminent domain statute. More broadly, there has never been a decision by this Court that any action of a government agency regarding property will always amount to a taking.

The decision below is an interpretation of Pennsylvania eminent domain law that is unlikely to be repeated in any jurisdiction other than Pennsylvania. Whatever wrong Moore may believe he has suffered, he has not been unconstitutionally deprived of a compensatory remedy. He need only go to the correct forum, under the correct theory, to seek the proper relief. He is not without recourse, but he is without a constitutional injury.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PAUL A. TUFANO
(Counsel of Record)
General Counsel
Commonwealth of Pennsylvania
Office of General Counsel
225 Main Capitol
Harrisburg, PA 17120
(717) 787-2551

VIRGINIA J. DAVISON
Assistant Counsel
WILLIAM W. SHAKELY
Chief Counsel
Office of Chief Counsel
Department of Conservation
and Natural Resources
P.O. Box 8767
Harrisburg, PA 17105-8767
(717) 772-4171